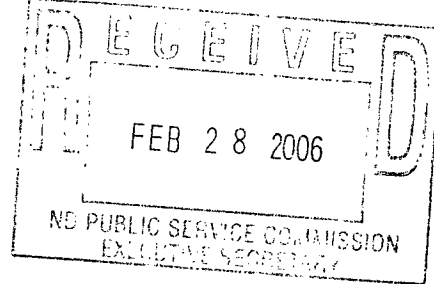


STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT

SOUTH CENTRAL JUDICIAL DISTRICT

Capital Electric Cooperative, Inc.)
)
 Plaintiff,)
)
 vs.)
)
 The City of Bismarck, North Dakota)
)
 and)
)
 Montana-Dakota Utilities, Inc., a)
 Division of MDU Resources Group,)
 Inc.)
)
 and)
)
 The Public Service Commission of)
 North Dakota)
)
 Defendants.)



**CAPITAL ELECTRIC COOPERATIVE'S
SUPPLEMENTAL BRIEF**

Docket Number 05-C-2303

This action for a declaratory judgment involves a territorial dispute between Capital Electric Cooperative (Capital) and Montana Dakota Utilities (MDU), a dispute over which has the superior legal right to provide electric service in an area known as Boulder Ridge First Addition to the City of Bismarck Boulder Ridge, a subdivision in northwest Bismarck (Boulder Ridge). Capital understands the only issue to be addressed at the March 2, 2006, hearing is whether this case will proceed as a declaratory judgment action or an appeal and is not the hearing on the appeal itself. As the trial court, and not the parties, raised the issue of whether this case is an appeal, the Court necessarily considered matters outside

the pleadings.

Further, Capital has two motions pending which need to be decided before the hearing on the merits:

1. Motion to Amend Complaint; and
2. Motion for Reconsideration.

Capital also requests a scheduling order. Capital received the record on appeal on February 24, 2006. Capital requires sufficient time to review the City's record on appeal, complete discovery and research, and to determine whether amendments or additions are necessary to complete the record. In addition, the proceeding's before the City were filed in video format. Capital needs a written transcript of the proceedings to prepare its case.

3. Background.

On August 30, 2005, MDU filed with the Board of City Commissioners of the City of Bismarck a "Petition to Declare Electric Franchise Rights" by which it petitioned the City Commission "to determine that:

1. Montana-Dakota is authorized under its electric distribution franchise to provide electric distribution service within 'Part of Boulder Ridge First Addition to the City of Bismarck' as annexed to the City of Bismarck on April 12, 2005; and
2. CEC is not authorized under its franchise to provide electric distribution service within 'Part of Boulder Ridge First Addition to the City of Bismarck' as annexed to the City of Bismarck on April 12, 2005."

On September 28, 2005, Capital filed a Complaint against MDU with the Public Service Commission, alleging that MDU has extended its facilities to Boulder Ridge, in

violation of N.D.C.C. § 49-03-01.3, and alleging that such service will unreasonably interfere with service provided by Capital.

On October 11, 2005, the City Commission held a meeting to discuss MDU's Petition. Representatives of MDU and Capital appeared at the meeting. Capital filed a reply to MDU's Petition and both MDU and Capital filed briefs. The City Commission did not conduct an evidentiary hearing.

On November 14, 2005, the City Commission issued its "Findings, Conclusions Decision and Order" where it "...Orders that the Petition of MDU is granted with respect to the provision of electric power services within part of Boulder Ridge First Addition to Bismarck.". (The "Findings, Conclusions Decision and Order" document is referred to herein as the "November 14th Order.")

On November 23, 2005, MDU filed with the PSC a motion to dismiss Capital's Complaint, on the grounds the PSC has no jurisdiction because: 1) the Board of Commissioners of the City of Bismarck has determined that MDU is authorized and Capital is not authorized to provide electric service in Boulder Ridge, and 2) that "The determination of franchise rights and service areas within the City of Bismarck lies exclusively with the Board of City Commissioners of the City of Bismarck" under Article VII Section 11 of the North Dakota Constitution.

On November 30, 2005, (after MDU's Motion in the PSC proceeding challenging the PSC's jurisdiction and after the City Commission's November 14th Order) Capital commenced an action in District Court under N.D.C.C. § 32-23, seeking a declaration of its rights under its franchise granted by the City in 1993. The principal defendant in that

action is the City of Bismarck. MDU and the PSC are also named as defendants (not as wrongful actors).

MDU's defensive claim in the PSC proceeding explains why Capital commenced the action in District Court seeking judicial review of the November 14th Order. Capital seeks judicial review of the November 14th Order, as more fully set forth in Capital's Amended Complaint.

2. Argument: This is not an "appeal".

"Appeal" is a common word to describe judicial review. Under N.D.C.C. § 27-05-06 Subsection 4, the District Court has "jurisdiction of appeals from ... the determinations of inferior officers, boards, or tribunals, in such cases and pursuant to such regulations as may be prescribed by law." Similarly, N.D.C.C. § 28-34-01 enacts procedures to govern "... any appeal provided by statute from the decision of a local governing body...."

Both state statutes and Bismarck's ordinances include rights of appeal to obtain judicial review of certain actions of local governing bodies. See, e.g. N.D.C.C. § 40-39-10 (appeal to District Court from municipal governing body's decision as to vacation of public grounds, streets or alleys); Section 40-47-11 (appeal from city governing body's zoning decision to District Court). Bismarck's code of ordinances (Sections 14-01-06 and 14-06-03) includes provisions for zoning decisions of its planning and zoning commissions and board of adjustment to be appealed to the Board of City Commissioners. Review of Bismarck's entire code of ordinances discloses only one instance (Section 10-09-11) where the ordinances provide a right to obtain judicial review by "appeal." (Appeal of decision of Board of City Commissioners following administrative appeal of decision of airport

manager.)

No ordinance, resolution or regulation has been enacted or adopted by the Board of Commissioners of the City of Bismarck to provide for appeal from the November 14th Order to District Court. No statute enacted by the North Dakota Legislature authorizes appeal to District Court from the November 14th Order. It should be particularly noted that N.D.C.C. Chapter 40-05, the statutory basis of the City's claimed powers exercised in the November 14th Order, does not include any provisions for an appeal for judicial review of a municipal governing body's exercise of any power under Chapter 40-05. There is no "appeal provided by statute" or "prescribed by law" for Capital to obtain judicial review of the November 14th Order by a procedure called "appeal." The absence of appeal procedures parallels the absence of statutes or ordinances to sustain the November 14th Order on its substance.

3. Argument: This is an action for declaration of rights.

It cannot be seriously claimed that the action of the City Commission is final, immune from judicial review solely because of the absence of an "appeal" authorized by statute or prescribed by law. Other forms of action may be commenced to obtain judicial review of the November 14th Order. Judicial review of a city's action sometimes takes the form of an action for mandamus (Mini-Mart, Inc. v City of Minot, 347 N.W.2d 131 (N.D. 1984) (herein Mini-Mart v Minot), or an action for an injunction (Munch v City of Mott, 311 N.W.2d 17 (N.D. 1981), or an action for declaratory judgment (Go Committee v City of Minot, 701 N.W.2d 865 (N.D. 2005). The opinion in one case that came to the Supreme Court via a certiorari procedure ended with the Court's remark that an action for declaratory

judgment is one proper method to challenge the city commission's action. Cowan v Stroup, 284 N.W.2d 447 (N.D. 1979). Cowan v Stroup is particularly relevant to the Boulder Ridge dispute, because it addressed the issue of a local governing board's assumption of judicial powers.

Capital's complaint in the Court action invokes the District Court's judicial power and original jurisdiction of all causes under the North Dakota Constitution, Article VI, Sections 1 and 8, and N.D.C.C. Section 27-05-06, and the power to grant declaratory judgments under N.D.C.C. Chapter 32-23. In the absence of any procedures for Capital to appeal the November 14th Order, N.D.C.C. Chapter 32-23 is an appropriate procedure to obtain judicial review of the November 14th Order.

As the words used in any statute are to be understood in their usual sense, (N.D.C.C. § 1-02-02), the plain language of N.D.C.C. Chapter 32-23 provides an appropriate procedure for Capital to obtain judicial review of the City Commission's action and a declaration of Capital's rights, status, or other legal relations under its franchise. Declaratory relief is not precluded where another adequate remedy exists. N.D.C.C. § 32-23-01; N.D. Rules of Civil Procedure, Rule 57. Declaratory relief is not precluded where there is no "appeal" process provided by statute or otherwise prescribed by law.

The remedy requested is a judicial determination and declaratory judgment of Capital's rights, status, or other legal relations affected by a statute, municipal ordinance, contract or franchise. Specifically, Capital seeks a judgment declaring that Capital has franchise rights to provide electric distribution services in the City of Bismarck, including Boulder Ridge, under its franchise granted by the City of Bismarck on May 25, 1993,

notwithstanding the Board of City Commissioner's purported decision and Order of November 14, 2005. More plainly expressed, and adopting the words of Mini-Mart v Minot, 347 N.W.2d at 138, the November 14th Order should be declared to be "ineffective."

The City's motion to dismiss criticized Capital's complaint as "overbroad" and asserted Capital has failed to exhaust administrative remedies in the PSC proceeding. The overbroad concern is resolved by Capital's Amended Complaint, filed with the City's consent. The Amended Complaint specifies in detail the factual and legal bases of the action, definitely stating a claim.

4. Argument: This is not a collateral attack on the PSC jurisdiction.

MDU (not the City) has criticized Capital's Complaint for a declaratory judgment as a collateral attack on the November 14th Order. (MDU Answer, paragraph 16). But the City has not complained of a collateral attack, recognizing the obvious: That Capital's action is appropriately direct, a direct challenge of the November 14th Order.

If Capital's action is "collateral" in any sense, it is collateral in relation to the PSC proceeding, but Capital's claim does not attack the PSC or its jurisdiction. Capital's action for a declaratory judgment supports the PSC's jurisdiction.

The Supreme Court has commented on, but has not explicitly approved, collateral proceedings. See Application of Otter Tail Power Co., 354 N.W.2d 701 (N.D. 1984) (herein Otter Tail 1984) (A collateral proceeding may be helpful to resolve questions of jurisdiction.) See also Application of Otter Tail Power Co., 452 N.W.2d 95 (N.D. 1990) (herein Otter Tail 1990) (Collateral proceedings challenging PSC's jurisdiction commenced by utility; PSC jurisdiction sustained.)

If there is any collateral attack anywhere in all the procedural jousting, it is MDU's self-induced Petition to the City Commission and MDU's endeavor to use the November 14th Order as a weapon to attack the jurisdiction of the PSC, dressed up in arguments about constitutional limitations on the PSC's jurisdiction.

5. Argument: This is a case of "acceptable bifurcation."

The City has also asserted that Capital's Complaint should be dismissed because it has failed to exhaust its administrative remedies. i.e., the dispute between Capital and MDU about which has the superior legal right to provide electric service in Boulder Ridge should be addressed in the proceeding Capital commenced in the PSC instead of in this action. MDU has made no separate motion, but supports the City's motion. (See MDU Brief, December 30, 2005.) Capital relies upon its Brief of January 6, 2006, to fully explain its position that there is no administrative remedy available for Capital to seek. (See Capital's Brief dated January 6, 2006, pages 7 - 10.)

6. Argument: Conclusion.

Capital commenced this action seeking judicial review of the City's action in a declaratory judgment proceeding. The City has moved to dismiss, asserting the complaint was indefinite and overbroad, and alternatively because Capital has an available administrative remedy. The overbroad problem has been resolved, by Capital's amended complaint, consented to by the City. In its January 30, 2006, Memorandum, the Court opined that it might have jurisdiction if Capital has "appeal" rights, however, no statute provides any appeal rights. Under these circumstances, where there is no right to an appeal and where an amended complaint has been filed with a more definite statement of

the plaintiff's claim, the motion to dismiss for failure to state a claim should be denied.

Capital's Amended Complaint states a claim upon which relief can be granted, and there is no administrative remedy available as an alternative to relief in the form of a declaratory judgment. Accordingly, the Motion to Dismiss should be denied.

Dated this 28 day of February, 2006.

PRINGLE & HERIGSTAD, P.C.

By: Carol K. Larson

Carol K. Larson - #04406

Attorneys for Capital Electric Cooperative, Inc.

Pringle & Herigstad, P.C.

2525 Elk Drive

PO Box 1000

Minot, ND 58702-1000

(701) 852-0381